Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90	)	**PR Docket No. 92-209**
of the Commission's Rules	)	**RM-7965**
to Expand Coordination of	)	
the 800 MHz General	)	
Category Channels	)	

To: The Commission

Opposition to Petition for Reconsideration

INDUSTRIAL TELECOMMUNICATIONS
ASSOCIATION, INC.
COUNCIL OF INDEPENDENT
COMMUNICATION SUPPLIERS
1110 N. Glebe Road, Suite 500
Arlington, VA 22201-5720
(703) 528-5115

Date: September 9, 1993

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S U M M A R Y

The Industrial Telecommunications Association, Inc. ("ITA") and the Council of Independent Communication Suppliers ("CICS") oppose the Petition for Reconsideration filed by the National Association of Business and Educational Radio, Inc. ("NABER") in this proceeding.

NABER's Petition for Reconsideration seeks to have the FCC reverse its decision permitting applicants for conventional SMR systems to obtain coordination from ITA and the Associated Public-Safety Communications Officers, Inc. ("APCO") in addition to NABER. Contrary to NABER's assertions, this decision represents a valid exercise of the broad administrative authority which Congress has vested in the Commission.

The Commission's decision was motivated by a desire to cure the "competitive disadvantage" facing applicants for conventional SMR stations when competing for channels against applicants seeking to expand or consolidate trunked SMR systems. The decision directly benefits applicants for conventional SMR systems. With the implementation of this decision, these applicants are now able to select a coordinator on the basis of competitive criteria such as quality, cost and speed of service.

ITA and CICS find NABER's proposal for cross-coordination to be inefficient and without merit. Implementation of NABER's suggestion would slow down the coordination process considerably. If the Commission were to implement cross-coordination as NABER suggests, there would inevitably be disputes between coordinators, and indirectly between applicants, as to which of two or more competing applications was entitled to a particular frequency in an area. Moreover, cross-coordination procedures would be inherently resource-intensive and wasteful of time and energy.

For these reasons and the other considerations set forth in this Opposition, ITA and CICS respectfully urge the Commission to affirm, without modification, the underlying decision in this proceeding.

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To: The Commission

Opposition to Petition for Reconsideration

The Industrial Telecommunications Association, Inc. ("ITA") and the Council of Independent Communication Suppliers ("CICS") hereby file this Opposition to the Petition for Reconsideration of the National Association of Business and Educational Radio, Inc. ("NABER") in the above-referenced proceeding.

I. Background

1. On May 11, 1993, the Federal Communications Commission adopted its Report and Order in this proceeding.[1] In that decision, the Commission determined that it was in the public interest to allow applicants seeking to establish conventional SMR systems on the 800 MHz General Category frequencies to obtain coordination from either NABER, ITA or the Associated Public-Safety Communications Officers, Inc. ("APCO").

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[1] Report and Order (FCC 93-247), released May 24, 1993, 58 Fed. Reg. 31,477 (June 3, 1993).

2. The Commission determined that no single frequency coordinator could be deemed the exclusive representative of SMR applicants. Therefore, in the interest of permitting applicants to select a coordinator on the basis of criteria such as quality, cost and speed of service, the FCC decided to allow any of the three recognized 800/900 MHz frequency coordinators to coordinate conventional SMR applications.

3. On July 6, 1993, NABER petitioned for reconsideration of the Commission's decision. Among other things, NABER argued that the decision was arbitrary and capricious because the Commission neglected to expand the proceeding to incorporate similar provisions for business, industrial/land transportation and public safety applications seeking access to General Category channels.

II. Opposition

A. The Decision To Expand Coordination Options Is A Valid Exercise of the FCC's Administrative Authority.

4. In its petition, NABER maintains that the underlying premise for the Commission's decision is faulty. In particular, NABER disputes the Commission's finding that "there is no entity representative of SMR applicants for conventional systems."[2] NABER's petition contends that the FCC did determine, in 1986,

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[2] Id. at paragraph 8.

that NABER was the coordinator most representative of conventional SMR applicants. As support for this proposition, NABER cites the Commission's Report and Order in PR Docket No. 83-737.[3]

5. It is accurate that the Report and Order in Docket No. 83-737 did designate NABER as the coordinator for conventional SMR applications. However, that decision can hardly be construed as a definitive declaration that NABER must necessarily be, for all time, the only entity qualified to coordinate conventional SMR applications. In pertinent part, the Report and Order stated,

> None of the entities who applied are individually representative of the existing users of the frequencies because, for licensing purposes, there is no separation or distinction made with regard to the service in which a user is eligible.[4]

6. Given the Commission's recognition in Docket No. 83-737 that none of the 800 MHz coordinators were individually representative of users, the decision in the instant proceeding to expand the coordination options available to users does not constitute a reversal of prior policy. Instead, the decision to allow conventional SMR applicants to obtain coordination from ITA and APCO must be viewed as a valid exercise of the administrative

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[3] Report and Order, adopted April 3, 1986, 103 F.C.C.2d 1093 (1986).

[4] Id. at paragraph 108.

authority which Congress has vested in the Commission. As the Commission is well aware, the courts have affirmed the FCC's "broad discretion" to change its regulatory approach in response to changing circumstances.[5]

B. The FCC's Decision Is Neither Arbitrary Nor Capricious.

7. NABER asserts that the Commission could not, as a matter of law, address the coordination of conventional SMR applications in isolation. It was arbitrary and capricious, NABER contends, for the Commission to expand coordination options for conventional SMR applications without adopting a similar approach for other conventional applications. ITA and CICS believe NABER's reasoning on this point is seriously flawed.

8. The Commission's decision was motivated, in part, by a desire to cure the "competitive disadvantage" facing applicants for conventional SMR stations when competing for channels against applicants seeking to expand or consolidate trunked SMR systems. This competitive disadvantage resulted from the fact that "the SMR applicant for a conventional system [did] not have the ability to choose the coordination service that best meets its requirements".[6]

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[5] See Telocator Network of America v. FCC, 691 F.2d 525, 540 (D.C. Cir. 1982).

[6] Report and Order, PR Docket No. 92-209, at paragraph 3.

9. The Commission's decision was a response to the "disparity among the three coordinators in the time required for coordinating applications".[7] The problem which the Commission sought to cure was directly related to situations in which, at the time, applicants for conventional SMR channels were disadvantaged because trunked SMR applicants seeking to use the same channels were able to obtain coordination for the desired channels more quickly from a coordinator other than NABER, in some cases. This disparity resulted from an apparent oversight in earlier proceedings.

10. The Commission has not identified analogous problems affecting applicants for conventional business, industrial/land transportation or public safety systems. There was, therefore, no need for the FCC to address applications for conventional business, industrial/land transportation or public safety systems in this proceeding. The Commission is not required, in the course of its rule making efforts, to conduct a search for potential problems or difficulties which arguably might benefit from subsequent rule making. It is sufficient for the Commission to confine its rule making activities to problems which have actually arisen and have been found to impede the administrative process or frustrate administrative fairness.

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[7] Id. at paragraph 5.

C. The Notification Process Is Sufficient To Prevent Administrative Inefficiency.

11. NABER urges the Commission to institute, on reconsideration, a system of "cross-coordination" for conventional SMR applications. Under NABER's suggested approach, each of the three certified coordinators would have to provide 10 days' advance notice before filing a conventional SMR application and frequency recommendation with the Commission. Within that 10-day period, the other coordinators would either indicate their concurrence with the proposed frequency recommendation, disagree with the frequency recommendation, or remain silent.

12. Under NABER's proposal, after expiration of the 10-day period, the entity performing the coordination could file the application with the Commission if the other coordinators have either given their concurrence or, alternatively, have not responded. NABER does not indicate what would happen where one or both of the other coordinators disagreed with the frequency recommendation. Presumably, however, if the coordinators' differences could not be resolved, the original coordinator would have to identify a different frequency and initiate the cross-coordination process all over again.

13. ITA and CICS find NABER's proposal for cross-coordination to be inefficient and without merit. Implementation of NABER's suggestion would represent a step backwards. It would

slow down the coordination process considerably. It would not improve the process. Under the current notification procedures for conventional 800 MHz frequencies, there is a very easy mechanism for resolving situations in which two applicants both seek to use the same frequency pair in the same area: the first application to be filed with the Commission has a priority claim to the frequency.

14. NABER's cross-coordination proposal would eliminate this very simple mechanism for resolving mutually exclusive application cases. NABER does not, however, suggest a suitable substitute. If the Commission were to implement cross-coordination as NABER suggests, there would inevitably be disputes between coordinators, and indirectly between applicants, as to which of two or more competing applications was entitled to a particular frequency in an area. From the perspective of ITA and CICS, cross-coordination would be the worst option available to the FCC in this situation. It would encumber a process which now functions, in most situations, in a relatively efficient manner.

15. Under NABER's proposal, there is no clearly definable and equitable basis for determining which of two or more competing applicants is entitled to a contested frequency. The applicant whose application bears the earliest date of receipt at the offices of one of the three coordinators might well have a

legitimate claim to the frequency. Alternatively, the applicant whose application was first reviewed and recommended for the frequency by one of the three coordinators could claim priority. Finally, the applicant whose cross-coordination notice was sent out earliest to the other coordinators could also assert rights to the frequency.

16. Cross-coordination procedures would be inherently resource-intensive and wasteful of time and energy. The entire process would be bogged down by the need for ministerial record-keeping. Regardless of the standard ultimately used to assign priority among conflicting applicants, the process would be certain to generate disputes among coordinators.

17. NABER perceives the existing process to be inefficient because two coordinators might be coordinating the same frequency for different applicants at roughly the same time. In this situation, when one of the applications is filed with the Commission, the responsible coordinator must then recommend a new frequency for the second applicant.[8] However, the current process is definitive and, in the vast majority of cases, efficient. Very simply, the applicant whose application is filed

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[8] As a matter of policy, ITA does not believe that an entity should have to pay for a coordination in situations where another coordinator filed a competing application with the FCC before ITA could file the entity's own application. In such situations, ITA reimburses the applicant for the cost of both the frequency coordination and the FCC filing fee.

first with the Commission has priority.

18. It is ITA/CICS's experience that the coordination conflicts which are of concern to NABER occur primarily when a coordinator is slow to enter into its electronic database the coordination notifications sent by other coordinators. If the individual frequency coordinators promptly record all notifications received from other coordinators, the incidence of duplicative frequency recommendations would be quite low. To further improve the process, however, ITA is willing to work with both NABER and APCO to institute procedures for electronically transmitting notifications of coordination to these other coordinators.

19. If, on the other hand, a coordinator is sluggish in recording these notifications or neglects to record them at all, the probability of duplicative frequency recommendations increases. In either event, however, it is a matter that is completely within the control of the individual coordinators. If implemented properly, the notification procedure is both effective and efficient.

III. Conclusion

20. ITA and CICS urge the Commission not to grant NABER's petition for reconsideration. The Commission's decision in this

proceeding was based on sound administrative law and public policy considerations. The decision will benefit the public by providing applicants for conventional SMR stations with additional frequency coordination options.

21. The Commission enjoys broad latitude to adapt its regulatory policies to meet changing circumstances. In this instance, the Commission's intent was to rectify a situation in which applicants for conventional SMR systems were placed at a competitive disadvantage vis-a-vis applicants seeking to use the same channels for trunked SMR systems. The rules adopted in this proceeding represent a logical and reasoned response to an identified problem. The rules have accomplished the intended objective.

22. NABER's proposal to institute a system of cross-coordination for conventional SMR applications is inherently defective. Cross-coordination would introduce significant inefficiencies into the process and would impede effective frequency coordination. In situations where two or more applicants were competing for the same frequency, the process of cross-coordination would introduce additional complexity into the process. There would not be a firm, definitive basis for ascertaining which application is entitled to the frequency. ITA and CICS therefore urge the Commission not to alter the notification process. It should be left intact.

WHEREFORE, THE PREMISES CONSIDERED, the Industrial Telecommunications Association, Inc. and the Council of Independent Communication Suppliers respectfully submit this Opposition and urge the Federal Communications Commission to act in accordance with the views expressed herein.

COUNCIL OF INDEPENDENT COMMUNICATION SUPPLIERS

By: _____
Andrew Daskalakis
Chairman

INDUSTRIAL TELECOMMUNICATIONS ASSOCIATION, INC.

By: _____
Mark E. Crosby, President
and Managing Director

By: _____
Frederick J. Day, Esq.
Director, Government Relations

Dated: September 9, 1993

CERTIFICATE OF SERVICE

I, Gail L. Burns, do hereby certify that on the 9th day of September 1993, I forwarded to the parties listed below a copy of the foregoing Opposition of the Industrial Telecommunications Association/Council of Independent Communication Suppliers, by first-class mail, postage pre-paid:

Ralph A. Haller
Chief, Private Radio Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 5002
Washington, D.C. 20554

Beverly G. Baker, Esq.
Deputy Chief, Private Radio Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 5002
Washington, D.C. 20554

Richard J. Shiben, Esq.
Chief, Land Mobile and Microwave Division
Private Radio Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 5202
Washington, D.C. 20554

Rosalind K. Allen, Esq.
Chief, Rules Branch
Private Radio Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 5202
Washington, D.C. 20554

Emmett B. Kitchen, Jr.
National Association for Business and Educational Radio, Inc.
1501 Duke Street
Suite 200
Alexandria, Virginia 22314

Gail L. Burns